STATE OF MICHIGAN

COURT OF APPEALS

DUANE MONTGOMERY,

Plaintiff-Appellant,

v

HUNTINGTON BANK and
SILVER SHADOW RECOVERY, INC.,

Defendant-Appellee.

UNPUBLISHED
October 11, 2002

No. 234182
Oakland Circuit Court
LC No. 2000-026472-CP

Before: Murphy, P.J., and Markey and R. S. Gribbs*, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment granting summary disposition in favor of defendants. The trial court ruled, pursuant to MCR 2.116(C)(7), that plaintiff's action was barred under the doctrine of res judicata. We affirm in part and reverse in part.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. Plaintiff's Oakland Circuit Court Complaint

On October 3, 2000, plaintiff, *in propria persona,* filed a complaint against defendants in the Oakland Circuit Court alleging various violations of the Michigan collection practices act (MCPA), MCL 339.901 *et seq.* Plaintiff specifically cited MCL 339.915(a), (e), (f), (k), (n), and (q).[1]

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] Those provisions read as follows:

> A licensee shall not commit 1 or more of the following acts:
>
> (a) Communicating with a debtor in a misleading or deceptive manner, such as using the stationary of an attorney or the stationary of a credit bureau unless it is disclosed that it is the collection department of the credit bureau.

(continued…)

This case arises out of the repossession of a BMW purchased by plaintiff's mother. The vehicle was in plaintiff's garage when it was repossessed by defendant Silver Shadow. Silver Shadow was acting on behalf of defendant Huntington Bank, which held the promissory note on the BMW. Plaintiff's mother had allegedly defaulted on the loan, although plaintiff argues that his mother became disabled and Huntington Bank failed to honor a credit disability policy allegedly purchased by his mother.

Plaintiff asserted that two employees of Silver Shadow illegally broke and entered into his garage and home when he was not present in a successful effort to repossess the BMW.[2] During the repossession, according to plaintiff, the Silver Shadow employees damaged plaintiff's concrete driveway and two of plaintiff's own cars that were parked near the BMW. Plaintiff further alleged that when he returned home, he found the two garage doors, a side door, and a front door unlocked and open. Personal items were allegedly missing from plaintiff's home, including an IBM laptop computer. Plaintiff indicated in his complaint that the loan agreement between his mother and Huntington Bank expressly stated that the bank would not

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(…continued)

* * *

> (e) Making an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt or concealing or not revealing the purpose of a communication when it is made in connection with collecting a debt.
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> * * *
>
> (f) Misrepresenting in a communication with a debtor any of the following:
>
> (i) The legal status of a legal action being taken or threatened.
>
> * * *
>
> (k) Using or threatening to use physical violence in connection with collection of a claim.
>
> * * *
>
> (n) Using a harassing, oppressive, or abusive method to collect a debt . . . .
>
> * * *
>
> (q) Failing to implement a procedure designed to prevent a violation by an employee.

[2] In plaintiff's complaint, he cited MCL 750.111 [entering without breaking] and MCL 750.115 [breaking and entering] of the Michigan Penal Code in support of his position.

breach the peace in any repossession attempts. Plaintiff filed a police report regarding the incident and his missing property.

Subsequently, plaintiff recovered, after paying $35.00 to Silver Shadow, the computer, which plaintiff alleged was now damaged, a digital camera, also allegedly stolen and damaged, his passport, and a credit card.[3] Plaintiff finally asserted in his complaint that defendants violated MCL 752.795, which criminalizes unauthorized access to computers. Plaintiff requested $120,000,000 in damages.

B. Plaintiff's Federal District Court Complaint

A few days prior to plaintiff filing his state court complaint, on September 28, 2000, plaintiff had filed a complaint, *in propria persona*, in the United States District Court for the Eastern District of Michigan. This complaint mimicked the state court complaint except, instead of alleged violations of the MCPA, plaintiff alleged violations of the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq.* Specifically, plaintiff alleged violations of 15 USC 1692c(b) [unauthorized communication with third parties], 1692d [harassment or abuse], 1692e(5) [threats of legal action], 1692e(10) [false representations or deceptive means used to collect a debt], 1692e(11) [failure to disclose that collector is attempting to recover a debt], and 1692e(14) [misrepresenting name of debt collector].

C. Defendants' Initial Motions for Summary Disposition in State Court

Defendant Silver Shadow filed a motion for summary disposition pursuant to MCR 2.116(C)(5), (6), (8), and (10), arguing that under the MCPA, plaintiff was not a "consumer" or "debtor" as defined in MCL 339.901(f), and Silver Shadow was not a "collection agency." Silver Shadow additionally argued that plaintiff had filed the same exact action in the federal court. The motion for summary disposition was filed at the same time Silver Shadow filed its answer. Defendant Silver Shadow did not assert the defense of res judicata in its answer or the motion for summary disposition.

Defendant Huntington Bank filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (6), arguing that the circuit court lacked jurisdiction because of the federal filing and that dismissal was proper because the federal action had been initiated between the same parties involving the same claim. Huntington Bank did not raise the defense of res judicata in its motion, and the record reveals that the bank never filed an answer.

At a hearing on December 6, 2000, the trial court conditionally granted defendants' motions for summary disposition, ruling:

> I'm going to grant the motion and I'm doing it pursuant to Federal Rule of Civil Procedure 18, which states that all claims a plaintiff has against a defendant may be joined in the federal action. And this is done simply out of the interest of judicial economy and, frankly, for the interest of all parties. If the federal court

[3] It is not entirely clear from the record whether plaintiff's personal property was simply in the BMW when repossessed or located in other areas of the home and garage.

> should determine that there is, in fact, a separate action, of course, come on back here. We're happy to do it. But my understanding of the rule at this time is that we give joinder, and then you may raise the issue at that time in federal court. Okay?

D. Defendants' Motion for Summary Disposition in the Federal Court

Defendant Huntington Bank filed a motion to dismiss in the federal court, arguing that it was not a "debt collector" under the FDCPA. Defendant Silver Shadow also filed a motion to dismiss, arguing that it was not a "debt collector" under the FDCPA and that plaintiff was not the real party in interest because his mother purchased the car.

On December 11, 2000, the federal court heard and granted defendants' motions to dismiss the FDCPA claims for the reasons argued by defendants.

E. Plaintiff's Postjudgment Motions Regarding Initial Motion for Summary Disposition

Plaintiff filed numerous postjudgment motions following the state trial court's decision to dismiss plaintiff's complaint. At a hearing held after the federal court's decision to dismiss the case, the circuit judge allowed plaintiff to proceed with his state court action based on the court's prior promise to plaintiff that he would be allowed to proceed if the federal action was dismissed. The trial court specified that it was not permitting plaintiff to refile his action but simply that the case was being reopened. The trial court also permitted defendants to renew their earlier motions for summary disposition by filing supplemental briefs.

F. Defendants' Second Motions for Summary Disposition in State Court

In light of the fact that the state court action was reopened, defendants renewed their motions for summary disposition as specifically allowed by the trial court. At the time these motions were filed, plaintiff had filed an appeal of the federal district court's decision in the United States Court of Appeals. In Huntington Bank's motion for summary disposition made pursuant to MCR 2.116(C)(5), (6), (7), (8), and (10), it argued that plaintiff's action was barred on the basis of res judicata because of the federal dismissal, and the bank argued that plaintiff failed to state a cause of action because plaintiff was not a "consumer" or "debtor," nor was the bank a "collection agency," under the MCPA. Silver Shadow essentially raised the same arguments as Huntington Bank. Additionally, plaintiff filed a cross-motion for summary disposition.

At the hearing on the motions conducted on April 4, 2001, the trial court, ruling from the bench, stated:

> It is the opinion of this Court that this cause of action is, in fact, barred by res judicata because all of the claims could have or should have been raised in the federal court. The federal court has already ruled that the plaintiff is not a party in interest or that the defendants are debt collectors pursuant to the Consumer Protection Act [sic]. That matter is now on appeal, as I understand it, in the federal court system. I am dismissing it.

II. ANALYSIS

A. Plaintiff's Arguments on Appeal

Plaintiff argues that defendants did not timely file the defense of res judicata. Defendants did not raise the defense of res judicata in their responsive pleadings or in the original motions for summary disposition. Defendants' supplemental briefs regarding the renewed motions for summary disposition constituted an amendment of the pleadings by implicitly adding a res judicata defense, which amendment required compliance with MCR 2.118(2). MCR 2.118(2) requires leave of the court or written consent of the opposing party prior to an amendment of a pleading sought more than fourteen days after the pleading was filed. Plaintiff did not consent to an amendment, nor was leave requested, and defendants did not file a motion to file supplemental pleadings pursuant to MCR 2.118(E). Therefore, res judicata was not properly pled in a timely manner under MCR 2.116(D)(2).

Plaintiff further argues that the loan agreement between his mother and Huntington Bank violated MCL 492.114(b) because the agreement contained an acceleration clause. Plaintiff next argues that Silver Shadow employees had no authority under state law to repossess a vehicle, that Silver Shadow had no authority to refuse to release the vehicle under MCL 257.252c, and that the repossession caused a breach of the peace in violation of the loan agreement.

Finally, plaintiff argues that res judicata is not applicable, in that, the state law claims could not have been heard by the federal court "because the matter of damages being litigated in the state case may not meet the minimum jurisdictional requirements of the federal court, as required under 28 USC 1332."

B. Summary Disposition – Standard of Review

This Court reviews de novo a ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether res judicata is applicable concerns a question of law subject to de novo review on appeal. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001).

C. MCR 2.116(C)(7) – Test

In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001).

D. The Doctrine of Res Judicata

Res judicata bars subsequent litigation between the same parties when the facts or evidence essential to the two actions are identical. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). The doctrine applies when: (1) the earlier action was decided on the merits; (2) the decree in that action amounted to a final decision; (3) the matter contested in the second action was, or could have been, resolved in the previous action; and (4) both actions involved the same parties or their privies. *Ditmore, supra* at 576.

The doctrine of res judicata bars both the claims that were actually brought by the parties in the earlier suit and those that the parties, exercising reasonable diligence, could have brought forward at that time. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999).

Res judicata, in general, serves to bar litigation based on the same events as a previous claim, regardless of whether the subsequent litigation is brought in a federal or state court. *Id.* Where a claim has been litigated in a federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. *Id.* at 380-381. State courts must apply federal claim-preclusion law in determining whether the prior federal judgment had preclusive effect. *Id.*[4]

E. Time Requirements as to Raising Defenses under the Court Rules and MCR 2.118

"Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). A ground listed in MCR 2.116(C)(7) "must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118." MCR 2.116(D)(2).

MCR 2.118(A)(1) allows a party to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party . . . ." Thereafter, a "party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2).

F. Our Discussion and Holding

We initially find that defendants properly raised the defense of res judicata. Although defendants did not raise the defense of res judicata in responsive pleadings or in the initial motions for summary disposition, the factual circumstances of the case did not warrant such action considering that the defense was not legally supportable prior to the federal court's dismissal of the action. To the extent that the trial court's allowance of supplemental briefs on the motions for summary disposition had the "effect" of amending the pleadings to add the affirmative defense of res judicata, it is clear that the court would have granted leave to so amend under MCR 2.118(A)(2), where it specifically permitted the filing of supplemental briefs on the issue of res judicata.[5] Moreover, justice would require such an amendment. MCR 2.118(A)(2). Additionally, considering that the briefs were "supplemental" briefs to the original motions for summary disposition, we see no violation of MCR 2.116(D)(2).

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[4] The four elements of res judicata under federal law are: (1) a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involves the same parties, or their privies, as the first; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) an identity of the causes of action. *Sanders Confectionary Products, Inc v Heller Financial, Inc*, 973 F2d 474, 480 (CA 6, 1992).

[5] We note, as stated above, that defendant bank had yet to file an answer.

Further, we dispense of plaintiff's appellate issues asserting violations of MCL 492.1149(b), relating to the loan agreement's acceleration clause, and MCL 257.252, relating to the alleged refusal to release the BMW. These alleged violations were never pled in either of plaintiff's complaints, nor is the subject properly presented as an appellate issue.

Finally, we reach the issue of whether res judicata was properly applied by the trial court. Three of the four res judicata elements are not subject to meaningful dispute; the federal action was decided on the merits, the federal judgment amounted to a final decision, and the state and federal actions involved the same parties. *Ditmore, supra* at 576. The sole element at issue is whether the matter contested in the state case was, or could have been, resolved in the federal action.

The matter that was actually resolved in the federal action was that plaintiff did not have a cause of action under the FDCPA because defendants were not "debt collectors" for purposes of the act, and plaintiff was not a real party in interest. Plaintiff's claims in the state action are premised on the MCPA and were not specifically resolved in the federal action because the claims were never presented in the federal complaint. We thus turn to the question of whether the MCPA claims could have been litigated as part of the federal lawsuit.

The trial court opined that plaintiff could have raised all of his claims in federal court, and the court earlier suggested that, pursuant to FR Civ P 18, plaintiff had the ability to join all of his claims in federal court.[6] We note that FR Civ P 18 is not truly helpful as to whether plaintiff could have joined his state law claims with the federal claims. Rather, 28 USC 1331 and 1367, relating to jurisdiction, require review. 28 USC 1331 provides federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Here, plaintiff's FDCPA action provided the federal district court with jurisdiction. 28 USC 1367(a) provides the federal court with supplemental jurisdiction over state law claims where it already has original jurisdiction, and where the state law claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The federal district court "may" decline to exercise supplemental jurisdiction over a state law claim if "the claim raises a novel or complex issue of State law," if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction," or if "the district court has dismissed all claims over which it has original jurisdiction[.]" 28 USC 1367(c).

Here, the state law claims could have been heard by the federal court because the federal court had supplemental jurisdiction under 28 USC 1367. However, the next question becomes whether the federal court's authority to hear the state law claims supports the res judicata ruling in the state court.

In *Pierson Sand, supra* at 382, our Supreme Court was presented with the question of whether the "plaintiffs' state claims, which were not brought with the federal action, are

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[6] FR Civ P 18(a) provides that "[a] party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party."

precluded by the doctrine of res judicata" in a motion for summary disposition in the state court, where the federal court previously dismissed the federal lawsuit. The Supreme Court held:

> [W]here the [federal] district court dismissed all plaintiff's federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state law claims. For the reasons stated below, we find that res judicata does not bar plaintiffs' instant action . . . . [*Id.* at 374-375.]

Additionally, this Court, in *Bergeron v Busch,* 228 Mich App 618, 627-628; 579 NW2d 124 (1998), adopted the following position:

> [M]ost state and federal courts have held that when the federal claim in a federal action is dismissed before trial and it is clear that the federal court would have declined to exercise jurisdiction over a related state claim that could have been raised in the federal action through pendent jurisdiction, a subsequent action in state court on the state claim that would have been dismissed without prejudice in the prior federal action is not barred by the doctrine of res judicata. [Citations omitted.]

Here, we believe it is clear that the federal court would have declined to exercise jurisdiction over plaintiff's related MCPA claims that could have been raised in the federal action in light of the dismissal of plaintiff's FDCPA claims; therefore, res judicata is not available as a defense in the state court action.[7] However, defendant Huntington Bank is entitled to dismissal pursuant to the doctrine of collateral estoppel because the federal court's ruling that the bank was not a "debt collector" under the FDCPA is equally applicable to the MCPA. Moreover, the bank is entitled to summary disposition based on its alternative argument to the trial court that plaintiff failed to state a cause of action under the MCPA because it is not a "collection agency."

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties, if the prior proceeding actually litigated and determined the issue and a final judgment has been entered. *Ditmore, supra* at 577.

Pursuant to 15 USC 1692a(6) & 1692k, only a debt collector is subject to liability, and a debt collector does not include a party who seeks to collect its own debts. *Aubert v American General Finance, Inc,* 137 F3d 976, 978 (CA 7, 1998). Pursuant to the MCPA, MCL 339.901(b)

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[7] We note that plaintiff's federal court complaint alleged separate distinct counts based solely on the FDCPA without immediate and direct reference to factual allegations in support of each count; however, the complaint later proceeds to identify numerous facts and wrongs, which could simply be considered as allegations supporting the FDCPA counts or possibly as separate state causes of action apart from the FDCPA, e.g., violation of MCL 752.795. To the degree that plaintiff's federal court complaint alleged state law causes of action outside of the FDCPA, those causes are barred by res judicata because the federal court necessarily dismissed any state causes of action aside from those under the MCPA, which was not referenced in the federal lawsuit.

also excludes a party from the definition of a "collection agency," where the party is seeking to collect its own debt. *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 731-732; 625 NW2d 804 (2001). Here, because the federal court implicitly found that Huntington Bank was attempting to collect a debt owed directly to it under the loan agreement, and because under both the FDCPA and the MCPA, liability cannot attach in a such situation, plaintiff is precluded to relitigate the issue under the doctrine of collateral estoppel. Moreover, based on the same reasoning, plaintiff failed to state a cause of action against defendant bank under the MCPA. Therefore, plaintiff's action against Huntington Bank was properly dismissed albeit for a different reason then relied upon by the trial court. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994).

However, collateral estoppel is not applicable to Silver Shadow. Under the FDCPA, Silver Shadow, a repossession agency, is generally not considered a "debt collector." 15 USC 1692a(6); *Jordan v Kent Recovery Services, Inc*, 731 F Supp 652, 660 (D Del, 1990). On the other hand, under the MCPA, MCL 339.901(b) specifically includes, in the definition of "collection agency," a party "repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another . . . ." Therefore, the federal court's implicit finding that Silver Shadow was only a repossession agency seeking to repossess the BMW, has no bearing on plaintiff's MCPA claims.[8] The trial court erred in granting summary disposition to Silver Shadow.

Affirmed in part and reversed in part.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Roman S. Gribbs

[8] The federal court's implicit ruling that plaintiff was not a real party in interest under the FDCPA because the loan was made to plaintiff's mother does not preclude litigation under the MCPA because MCL 339.916 provides that "[a] person who suffers injury, loss, or damage, or from whom money was collected by the use of a method, act, or practice in violation of this article . . ., may bring an action for damages or other equitable relief." Therefore, standing to file suit is not limited to a party who actually incurred the debt, and plaintiff claimed damages resulting from Silver Shadow's allegedly illegal effort to repossess plaintiff's mother's BMW.